(13) (6)

Nos. 84-495 and 84-1379

Office-Supreme Court, U.S.
FILED
JUL 15 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, ET AL., APPELLANTS

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.

EUGENE F. DIAMOND, ET AL., APPELLANTS

v.

ALLAN G. CHARLES, ET AL.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

CAROLYN B. KUHL
Deputy Assistant Attorney General

JOHN F. CORDES
JOHN M. ROGERS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Interest of the United States	1
Summary of argument	2
Discussion	3
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Adamson v. *California*, 332 U.S. 46	25
Adkins v. *Children's Hospital*, 261 U.S. 525	25
Akron v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416	*passim*
Atascadero State Hospital v. *Scanlon*, No. 84-351 (June 28, 1985)	21
Beal v. *Doe*, 432 U.S. 438	3, 17
Bellotti v. *Baird*, 443 U.S. 622	4, 5, 18, 19
Black v. *Cutter Laboratories*, 351 U.S. 292	12
City of Mesquite v. *Aladdin's Castle, Inc.*, 455 U.S. 283	11
Colcutti v. *Franklin*, 439 U.S. 379	6, 8
Doe v. *Bolton*, 410 U.S. 194	3
Duncan v. *Louisiana*, 391 U.S. 145	27
Eisenstadt v. *Baird*, 405 U.S. 438	29
Erie R. Co. v. *Tompkins*, 304 U.S. 64	21
Furman v. *Georgia*, 408 U.S. 238	26
Garcia v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985)	21
Glidden Co. v. *Zdanok*, 370 U.S. 530	21
Gregg v. *Georgia*, 408 U.S. 238	26
Griswold v. *Connecticut*, 381 U.S. 479	28
H.L. v. *Matheson*, 450 U.S. 398	18, 19
Harris v. *McRae*, 448 U.S. 297	18
Kastigar v. *United States*, 406 U.S. 441	26
Lochner v. *New York*, 198 U.S. 45	25, 29, 30
Los Angeles v. *Lyons*, 461 U.S. 95	13
Loving v. *Virginia*, 388 U.S. 1	29
Lynch v. *Donnelly*, No. 82-1256 (Mar. 5, 1984)	26

Cases—Continued: Page

Maher v. *Roe*, 432 U.S. 473 ..... 3, 7, 17, 18, 19
Marsh v. *Chambers*, 463 U.S. 783 26
Meyer v. *Nebraska*, 262 U.S. 390 29
Miranda v. *Arizona*, 384 U.S. 436 26
Pierce v. *Society of Sisters*, 268 U.S. 510 29
Planned Parenthood Ass'n v. *Ashcroft*, 462 U.S. 476 ..... 5, 10
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 ..... 3, 9, 14, 17, 19, 20
Poe v. *Ullman*, 367 U.S. 497 ..... 13, 28
Prince v. *Massachusetts*, 321 U.S. 158 29
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 27
Rochin v. *California*, 342 U.S. 165 ..... 24, 27
Roe v. *Wade*, 410 U.S. 113 ..... *passim*
Shapiro v. *Thompson*, 394 U.S. 618 27
Simopoulos v. *Virginia*, 462 U.S. 506 23
Skinner v. *Oklahoma*, 316 U.S. 535 29
Stanley v. *Georgia*, 394 U.S. 557 29
Williams v. *Florida*, 399 U.S. 78 26

Constitution and statutes:

U.S. Const.:
Art. III 13
Amend. I (Establishment Clause) 26
Amend. IV 28
Amend. V 26
Amend. VI 26
Amend. VIII 26
Amend. XIV (Due Process Clause) 2, 25, 26, 28
Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926 1
42 U.S.C. 300a-6 1
43 U.S.C. 1901(a)(6) 20
18 Pa. Cons. Stat. Ann. (Purdon 1983):
§ 3205 7
§ 3205(a)(2)(i) 7
§ 3205(a)(2)(ii) 7
§ 3205(a)(2)(iii) 8

Constitution and statutes—Continued: Page

§ 3206 5
§ 3206(c) 5
§ 3206(f) 5
§ 3206(h) 5
§ 3208 8
§ 3208(a)(1) 7
§ 3208(a)(2) 7, 9
§ 3210(a) 6
§ 3210(b) 6
§ 3210(c) 5, 6
§ 3211 9
§ 3214 9
§ 3214(a) 9
§ 3214(a)(8) 9

Miscellaneous:

A. Bickel, *The Morality of Consent* (1975) 24
Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329 24
Ely, *The Wages of Crying Wolf: A comment on* Roe v. Wade, 82 Yale L.J. 920 (1973) 24, 28
J. Ely, *Democracy and Distrust* (1980) 24
Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159 24
Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949) 25
Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817 24
J. Mohr, *Abortion in America* (1978) 25, 26
Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973) 24

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-495

RICHARD THORNBURGH, ET AL., APPELLANTS

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ET AL.

No. 84-1379

EUGENE F. DIAMOND, ET AL., APPELLANTS

v.

ALLAN G. CHARLES, ET AL.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE UNITED STATES

These cases involve the efforts of two state legislatures to balance the competing interests at stake in the abortion decision. Congress has in the past enacted legislation affecting that decision (see 42 U.S.C. 300a-6; Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 926), and may do so again. This Court's continuing effort to define the perimeters of permissible abortion regulation has a direct impact upon the ability of the country's elected representatives—both state and federal—to deal with this important question of great public import and heated political debate.

SUMMARY OF ARGUMENT

The opinions of the courts below are multiply flawed. In their manifest eagerness to strike down the state statutes in question they transgress numerous canons of constitutional adjudication: provisions are construed so as to impugn rather than save their constitutionality; facts stipulated solely for purposes of a preliminary injunction are taken as dispositive for an ultimate judgment on the statute; and provisions repealed and substantially recast to meet constitutional objections are struck down in their earlier versions. More substantively, the courts below reach their conclusions as if this Court in *Roe* v. *Wade* had posited only one value, a woman's unfettered right to an abortion, rather than a balance of values which include the state's interest in maternal health and in unborn and future life. The harsh and one-sided nature of the decisions below may in part be a response to a change in emphasis in this Court's opinion in *Akron* v. *Akron Center for Reproductive Health*, which itself expressed considerable impatience with legislative attempts to balance the interests recognized in *Roe* v. *Wade*. To the extent this is so, these cases and *Akron* itself are not just wrong turns on a generally propitious journey but indications of an erroneous point of departure. Indeed, the textual, doctrinal and historical basis for *Roe* v. *Wade* is so far flawed and, as these cases illustrate, is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it.

DISCUSSION

A. In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), this Court held that the "right of privacy" emanating from the Due Process Clause "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." But the Court has consistently rejected the notion that "the Constitution requires abortions on demand" (*id.* at 208 (Burger, C.J., concurring)). Rather, the Court has held, in this and other contexts, that the right of privacy "is not unqualified and must be consid-

ered against important state interests in regulation" (*id.* at 154).

Perhaps the dominant governmental interest recognized in the Court's opinions is the state's "unquestionably strong and legitimate interest in encouraging normal childbirth," an interest that "exist[s] throughout the course of the woman's pregnancy" (*Beal* v. *Doe*, 432 U.S. 438, 446 (1977)). And the Court has consistently recognized that the state has "an important and legitimate interest," which likewise exists throughout pregnancy, in safeguarding the health of the mother and in maintaining medical standards. *E.g.*, *Roe* v. *Wade*, 410 U.S. at 154; *Doe* v. *Bolton*, 410 U.S. 179, 194-195 (1973); *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 80-81 (1976).

In evaluating state efforts to further these legitimate interests, this Court and its individual Justices have said that a regulation "is not unconstitutional unless it unduly burdens the right to seek an abortion." *E.g.*, *Maher* v. *Roe*, 432 U.S. 464, 473 (1977) (original quotation marks omitted). Indeed, the Chief Justice has stated his understanding that "[t]he Court's holdings in *Roe* v. *Wade* * * * and *Doe* v. *Bolton* * * * simply require that a State not create an absolute barrier to a woman's decision to have an abortion" (*Maher* v. *Roe*, 432 U.S. at 481 (Burger, C.J., concurring)).

The decisions below are inconsistent with these principles and should be reversed. The courts of appeals betrayed unabashed hostility to state regulation of abortion and ill-disguised suspicion of state legislators' motives. The courts repeatedly failed "to give proper weight to the legislative decision, as expressed in the statute, to protect the life and health of the woman and the child subject to abortion" (84-495 J.S. App. 170a (Weis, J.)). A persistent theme of the decisions below is "the notion that normal rules of law, procedure, and constitutional adjudication suddenly become irrelevant solely because a case touches on the subject of abortion" (*Danforth*, 428 U.S. at 98 (White, J., concurring and dissenting)). The decisions below thus not only "have far-reaching effects"

on the abortion issue, but also "implicate the proper role of the states and the federal courts" under our Constitution (84-495 J.S. App. 172a-173a (Weis, J.)).

1. *No. 84-495.* The Third Circuit signaled its antipathy in the opening section of its opinion, in which it imputed to the Pennsylvania legislature "a pervasive invalid intent" to "restrict a pregnant woman's fundamental right to choose an abortion" (84-495 J.S. App. 31a, 32a). The court suggested that the legislature was somehow culpable for enacting "a complex and extensive regulatory scheme * * * containing numerous provisions which it had been advised skirted constitutional limits" (*id.* at 86a). The court faulted the legislature for passing the abortion bill "after scant debate" (*id.* at 13a) and for attaching it to another bill the court did not view as "germane" (*id.* at 12a & n.3). The court relied heavily (*id.* at 12a-13a) on newspaper accounts about a cosponsor's alleged opposition to *Roe* v. *Wade*. And even though the case was on appeal from the district court's denial of a preliminary injunction,[1] the court of appeals reached out to render a final judgment holding most of the statute unconstitutional, asserting that "[t]he customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review" (84-495 J.S. App. 21a).

The court's zeal to place the worst possible construction upon the Pennsylvania statute is evident from its treatment of the specific provisions challenged. That treatment is seriously at odds with this Court's abortion opinions and with basic principles of judicial review.

a. Section 3206(c) provides that a pregnant minor, without seeking parental consent, may petition the appropriate court to authorize an abortion upon a finding that she "is mature and capable of giving informed consent * * * and has, in fact, given such consent" (18 Pa. Cons. Stat. Ann. (Purdon 1983)). This provision codifies the holding in *Bellotti* v. *Baird* (*Bellotti II*), 443

[1] The district court had granted a preliminary injunction as to one section of the statute, but the State conceded the invalidity of that section on appeal (84-495 J.S. App. 18a, 33a-34a).

U.S. 622, 648-651 (1979). The statute provides that such court proceedings "shall be confidential and shall be given such precedence * * * as will ensure that the court may reach a decision promptly and without delay" (§ 3206 (f)). The judge must rule "within three business days of the date of application" (*ibid.*). The statute mandates an "expedited confidential appeal" if authorization is denied and directs the Pennsylvania Supreme Court to issue "such rules as may be necessary to * * * ensure confidentiality and * * * promptness of disposition" (§ 3206 (h)).

The court of appeals "d[id] not invalidate section 3206" (84-495 J.S. App. 56a). The court nevertheless proceeded to enjoin the statute's enforcement "until the state promulgates [the] regulations" referred to above (*ibid.*). This Court has made it clear, however, that a state is not constitutionally required to have regulations on this subject, expressing confidence that state courts will expedite cases involving minors' consent consistently with this Court's decisions. *Bellotti II*, 443 U.S. at 645 & n.25. Accord, *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 491 n.16 (1983). The court of appeals' action in enjoining enforcement of a state law, without any finding that it contravenes federal law or the federal Constitution, is unprecedented and remarkable.

b. Section 3210(c) requires the attendance of a second physician at abortions performed after viability. This provision, like the provision at issue in *Ashcroft*, contains no explicit exception for medical emergencies (see 462 U.S. at 485 & n.8). The Court in *Ashcroft* inferred such an exception under the latter statute and held it valid (*ibid.*). The court of appeals refused to infer a comparable exception under Section 3210(c) here. It did so even though Section 3210(a) provides a "complete defense to any charge brought against a physician for violating the requirements *of this section* * * * that the abortion *was necessary to preserve maternal life or health*" (emphasis added). The court justified its holding by asserting that subsections (a) and (c) are "separated by [an] intervening provision [viz., subsection (b)]

which on its face evinces the Pennsylvania legislature's unconstitutionally restrictive view of maternal health" (84-495 J.S. App. 73a). The court's insistence that the statute be construed so as to create rather than to remove constitutional problems inverts well-established canons of judicial review.

c. Section 3210(b) provides that the method of abortion used when the fetus is viable must be the one most likely to produce a live birth, unless that method would cause a "significantly greater" risk to the mother. The district court, in an effort to discharge its "oblig[ation] to give the statute [a] reasonable interpretation which avoids the danger of constitutional invalidity" (84-495 J.S. App. 247a-248a), interpreted "significantly greater" to mean "medically cognizable," and held the statute as thus interpreted valid under *Colautti* v. *Franklin*, 439 U.S. 379, 400 (1979). The court of appeals refused to adopt this construction, finding it "inconsistent with * * * the legislative intent," and accordingly declared the statute unconstitutional (84-495 J.S. App. 79a). It did so even though the district court had shown that its saving construction was supported by a dictionary definition of the relevant words (*id.* at 248a). And it did so without even considering the possibility of abstaining to ascertain whether the Pennsylvania courts might adopt the same construction that the district court did.

d. Section 3208, entitled "Printed Information," directs the Pennsylvania Department of Public Health to publish easily comprehensible pamphlets describing assistance available to pregnant women through public and private agencies. These pamphlets are to include the following statement: "The Commonwealth of Pennsylvania strongly urges you to contact [these agencies] before making a final decision about abortion" (§ 3208(a)(1)). The statute also directs the Department to publish literature discussing the unborn child's probable anatomical characteristics and possibility of survival, provided that such material is "objective, nonjudgmental and designed to convey only accurate scientific information" (§ 3208(a)(2)).

The court of appeals declared this statute unconstitutional (84-495 J.S. App. 58a-59a). It did not base this holding on a determination that the section, standing alone, was invalid. Indeed, such a determination would contravene this Court's ruling that a state may "make a value judgment favoring childbirth over abortion, and * * * implement that judgment by the allocation of public funds" (*Maher* v. *Roe*, 432 U.S. at 474). The court of appeals based its holding, rather, on a determination that Section 3208 was "inextricably intertwined" (84-495 J.S. App. 58a) with another section which the court thought unconstitutional. The sole link between the two sections is a statutory cross-reference (see *id.* at 137a (Seitz, C.J., dissenting)). The court invalidated Section 3208 based on this supposed "inextricable" connection even though the law contains an explicit severability clause (*ibid.*). The court's approach is unjustifiable and can only be explained as an attempt to censor printed matter the majority did not like.

e. Section 3205, entitled "Informed Consent," provides that a woman's consent to abortion will be deemed "voluntary and informed" only if the referring or the attending physician provides her with information about the relative medical risks, both physical and psychological, of abortion and childbirth. The doctor or his agent must also inform the woman of the availability of certain financial assistance and social services in the event of childbirth (§ 3205(a)(2)(i) and (ii)). Finally, the doctor or his agent must inform the woman that she has a right to review, but need not review, the printed materials described above (§ 3205(a)(2)(iii), cross-referring to § 3208).

The court of appeals held this statute unconstitutional, citing *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). The court of appeals inferred that " 'much of the information required * * * is designed not to inform the woman's consent but rather to persuade her to withhold it altogether' " (84-495 J.S. App. 48a (quoting 462 U.S. at 444)). And the court viewed the statute as mandating "a litany of information" that in-

trudes upon the attending physician's discretion (84-495 J.S. App. 48a-49a (quoting 462 U.S. at 444-445)).

The court of appeals plainly erred. Most of the information Pennsylvania requires is identical to that which the Court in *Akron* deemed "certainly * * * not objectionable," "probably * * * routinely made available to the patient," and "clearly * * * related to maternal health and to the State's legitimate purpose in requiring informed consent" (462 U.S. at 445-446 & n.37). It is true that Pennsylvania requires the doctor himself to provide the relevant medical information, permitting him to delegate to an assistant the provision of information about social services, financial assistance, and the like. Cf. *Akron*, 462 U.S. at 448-449 (holding that the physician generally must be allowed to "delegate[] the counselling task to another qualified individual"). But the division of labor Pennsylvania has adopted is surely a rational one, particularly in light of this Court's repeated stress on "the central role of the physician * * * in consulting with the woman about whether or not to have an abortion" (*Colautti*, 439 U.S. at 387).

The court of appeals likewise erred in holding that Pennsylvania cannot require that a woman be informed "[t]hat she has the right to review" certain printed materials (discussed above) published by the state health department. This information, unlike that deemed a "parade of horribles" in *Akron* (462 U.S. at 445), is required to be "objective, nonjudgmental and * * * accurate scientific information" (§ 3208(a)(2)). Moreover, the woman is free to decide for herself whether or not she wants to read these pamphlets, and "nothing in the statute prevents the physician from advising that [she] not view [them] or disputing or supplementing them with his own information" (84-495 J.S. App. 140a (Seitz, C.J., dissenting)). This Court has repeatedly held that the state may promote maternal health by ensuring that a woman's abortion decision is truly knowing, voluntary, and informed. It cannot seriously be contended that a state, by offering a person the right to read objective,

nonjudgmental materials before making a decision, would be held unconstitutionally to compel or coerce that person's decision in any other legal context.

f. Section 3214(a) requires that "[a] report of each abortion performed * * * be made to the department on forms prescribed by it." The physician must report routine statistical information about each abortion, such as the patient's age and marital status (but not her identity), the type of abortion procedure used, and any medical complications resulting therefrom. He must also report the basis for his determination "that a child is not viable," and, if he determines that the fetus is viable, to report "the basis for his determination that the abortion is necessary to preserve maternal life or health" (§ 3214 (a)(8), cross-referring to § 3211).

The court of appeals held this statute unconstitutional. While acknowledging that this Court has approved recordkeeping and reporting requirements for abortions, it asserted that "[t]he nature and complexity of [Pennsylvania's] requirements * * * have crossed the permissible threshold" (84-495 J.S. App. 80a). It reasoned that Pennsylvania's law would "have a significant impact on the woman's abortion decision" by "increas[ing] the costs of * * * abortions" by an unspecified amount (*id.* at 80a-81a).

The court of appeals' reasoning is seriously flawed. The statistical information Pennsylvania requires to be reported is information that "most physicians would obtain as a matter of course, or which is easily obtained through simpl[e] questions or observation" (84-495 J.S. App. 148a (Seitz, C.J., dissenting)). The court of appeals had no basis for distinguishing Pennsylvania's recordkeeping requirements from those approved in *Danforth*. Compare 428 U.S. at 79-81. The parties' stipulation that Pennsylvania's requirements would increase abortion costs by an unspecified amount—recordkeeping requirements always increase costs, a fact that obviously was equally true in *Danforth*—is irrelevant absent evidence about the magnitude of those expenses. Indeed, a host of state laws (be they tax laws or regulatory re-

quirements) impose increased costs on providers of medical services, and it could scarcely be contended that such laws are therefore unconstitutional. In any event, the record in this case contains no evidence about the actual costs imposed by Pennsylvania's reporting requirements, and the court of appeals thus had "no way of knowing what cost increase is attributable to [them]" (84-495 J.S. App. 149a (Seitz, C.J., dissenting)). Cf. *Ashcroft*, 462 U.S. at 489-490 (noting district court's findings as to cost of pathology reports and holding that those costs imposed "a relatively insignificant burden").

The court of appeals likewise erred in holding that Pennsylvania cannot require doctors to report the basis for their determinations about fetal viability and danger to maternal health. It is far-fetched to suggest, as did the court of appeals (84-495 J.S. App. 81a), that such reporting violates this Court's "directive that a physician be accorded broad discretion" in making these determinations. Obviously, a doctor does not have "discretion" to make unjustifiable and unsupportable judgments about life and death, and it is neither an affront nor an unreasonable burden to require that he rationally explain the basis for such decisions. Nor can it seriously be contended that the need to furnish such explanations unconstitutionally "chills" physicians' willingness to perform abortions. It is hard to see how Pennsylvania can enforce its legitimate interest in protecting fetal life if it is foreclosed from seeking such information.

2. *No. 84-1379.* The Seventh Circuit, ruling unanimously, struck down four sections of the Illinois Abortion Law. The court's decision ignores elementary principles of jurisdiction, comity and federalism in its relentless determination to invalidate the challenged provisions at all costs.

a. Section 6(4) of the Illinois Abortion Law, as enacted in 1979, prescribed a standard of care for a doctor performing an abortion when there existed "a possibility known to him" of fetal viability (84-1379 J.S. App. 8). On November 16, 1979, four days before Section 6(4)'s effective date, the district court issued a preliminary in-

junction against its enforcement, finding that it incorporated an unconstitutional definition of "viability" (*id.* at 3). In October 1983, the district court converted the preliminary injunction into a permanent injunction (579 F. Supp. 464, 470-471 (N.D. Ill. 1983)). On June 30, 1984, while the instant appeal was pending in the Seventh Circuit, the Illinois legislature amended Section 6(4) (see 84-1379 J.S. App. 9, 58-59). The court of appeals recognized that this amendment "substantially altered" Section 6(4) and the court specifically "decline[d] to evaluate [the] constitutionality" of the current version of the statute (84-1379 J.S. App. 9).

The court of appeals, however, proceeded to declare the repealed version of Section 6(4) unconstitutional. Rejecting the State's suggestion of mootness, the court likened the legislature's 1984 revision of the statute to "a defendant's voluntary abandonment" of prior unconstitutional conduct (84-1379 J.S. App. 18). The court theorized that the Illinois legislature "could reenact" the repealed version of Section 6(4), and was persuaded that "such a result would not be unlikely" inasmuch as the legislature had amended Section 6(4) twice during the previous five years (84-1379 J.S. App. 19-20). The court concluded that the State had failed to prove that it would not "return to its old ways" if plaintiffs' challenge were dismissed (*id.* at 20). The court also suggested that the 1983 version of the statute might have residual "chilling effects" despite its repeal (*ibid.*).

The court's reasoning is remarkable. The old version of Section 6(4) had been under continuous injunction from the day it was enacted until the day it was repealed. The statute thus could never have been applied to anyone, and the controversy concerning its validity was accordingly moot. Although this Court has recognized a narrow exception to the mootness doctrine where defendants "voluntarily abandon" challenged conduct for the purpose of evading judicial review (*City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)), we know of no instance, and the court of appeals cited none, where this exception has been held to cover a statutory amend-

ment by a state legislature, which, of course, is not even a "defendant" here.

The court of appeals, moreover, had absolutely no basis for concluding that reenactment of the defunct, allegedly unconstitutional statute was likely. The legislature's previous amendments to the law surely provided no basis for that conclusion, since those amendments, as the court itself recognized, represented faithful and repeated attempts "to alter the contours of [the] statute to reflect the latest judicial pronouncements in the area of abortion and privacy" (84-1379 J.S. App. 20). More generally, principles of federalism and comity make it wholly inappropriate for a federal court to presume that a state legislature and governor will act in bad faith by repealing and then reenacting a statute for the purpose of evading judicial review.[2]

b. Section 6(1) of the Illinois Abortion Law, as amended in 1979, prescribed a standard of care for a doctor performing an abortion "after the fetus is known to be viable" (84-1379 J.S. App. 6). On November 16, 1979, four days before the statute became effective, the district court preliminarily enjoined its enforcement, finding that it incorporated an unconstitutional definition of viability (*id.* at 3). In September 1983, the Illinois legislature amended the definition of viability, providing that a fetus is viable "when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support" (*id.* at 7, 58). On October 14, 1983, the district court sustained the amended definition

---

[2] Appellants suggest (84-1379 J.S. 43) that, while the controversy as to the old version of Section 6(4) is moot, the controversy as to its current version remains alive, since the court of appeals' rationale for invalidating the former would also apply to the latter. Although we sympathize with appellants' desire to obtain guidance from this Court, we cannot agree with this submission. The court of appeals expressly "decline[d] to evaluate [the] constitutionality" of the current provision (84-1379 J.S. App. 9), and this Court "reviews judgments, not statements in opinions" (*Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

of viability, held that Section 6(1) was thus constitutional, and lifted the preliminary injunction (579 F. Supp. at 466, 469). On June 30, 1984, while the instant appeal was pending in the Seventh Circuit, the Illinois legislature amended Section 6(1) (see 84-1379 J.S. App. 7, 57-58). The court of appeals recognized that this amendment "substantially transformed section 6(1)" and the court "accordingly decline[d] to discuss the constitutionality" of the current version (*id.* at 7).

Once again, however, the court of appeals proceeded to declare the repealed version of the statute unconstitutional. Rejecting the State's suggestion of mootness, the court noted that old Section 6(1) had operative effect for the eight-month period between October 14, 1983, and June 30, 1984. The court observed that the statute of limitations had not expired with respect to events occurring during that period, and hence suggested that the State "could prosecute plaintiffs * * * if [they] violated [the repealed] section while it remained in effect" (84-1379 J.S. App. 15). The court found "this possibility insufficiently speculative to render [their] challenge * * * moot" (*id.* at 16).

The court's reasoning is flawed. The State explicitly advised the court of appeals that it would not initiate prosecutions of the type appellees assertedly feared (see 84-1379 J.S. 42, 48). Moreover, appellees brought a facial challenge to Section 6(1) and did not allege that they performed any late-term abortions during the eight-month period in question (see *id.* at 43). The possibility that appellees might be prosecuted under the old statute is thus too conjectural to satisfy Article III requirements. See, *e.g.*, *Los Angeles* v. *Lyons*, 461 U.S. 95, 101-110 (1983); *Poe* v. *Ullman*, 367 U.S. 497, 507 (1961).

On the merits, the court of appeals held the old version of Section 6(1) unconstitutionally vague. That statute made it illegal, in the case of a pregnancy termination "after the fetus is known to be viable," for "[a]ny physician or person assisting in such a pregnancy termination" intentionally to fail to manifest a specified standard of care. The court found the statute vague because

it "does not specify * * * which party, physician or assistant, must make this viability determination" (84-1379 J.S. App. 26).

As noted above, the Illinois legislature in September 1983 had amended the statute's definition of "viability" so as to make the determination of viability depend on "the medical judgment *of the attending physician.*" It would have required no great leap of logic for the court of appeals thence to infer that the legislature meant the determination of the attending physician, not of his assistant, to govern under old Section 6(1). Indeed, the 1984 amendment to Section 6(1) makes this explicit. See 84-1379 J.S. App. 57-58. We think that a fair reading of the statute compelled this construction of the 1983 version. In any event, this construction was plainly permitted, and the court of appeals was obliged to adopt that permissible construction under the well-settled principle that federal courts should construe state statutes in a manner favoring their constitutionality.

c. Section 2(10) of the Illinois Abortion Law defines an "abortifacient" as any substance or device "known to cause fetal death." Section 11(d) requires any person who prescribes or administers a substance or device "which he knows to be an abortifacient" to tell the recipient "that it is an abortifacient." Intentional or reckless failure to provide this information is a misdemeanor.

The court of appeals held these two provisions unconstitutional (84-1379 J.S. App. 43). The court did not suggest that Section 2(10)'s definition of "abortifacient" is inaccurate. Nor did it suggest that it is unconstitutional for a state to require a doctor who performs an abortion, or who prescribes an abortifacient, to tell his patient what he is doing. Indeed, a state in regulating abortions indisputably may require "the giving of information to the patient as to just what [will] be done and as to its consequences" (*Danforth*, 428 U.S. at 67 n.8). Rather, the court invalidated these two provisions because Section 2(10), in defining "abortifacient," refers to "fetal death," and because *another* section of the statute—Section 2(9), which was repealed in September

1983—formerly defined "fetus" as "a human being from fertilization until birth" (see 84-1379 J.S. App. 39-40, 60). Reading these three sections together, the court concluded that Section 11(d) unconstitutionally "foist[s] upon the pregnant woman [the State's] view that life begins at conception" (84-1379 J.S. App. 39 (citing *Akron*, 462 U.S. at 444)).

This line of reasoning is strained indeed. Section 11(d) simply requires that a doctor, when administering something that is likely to destroy the fetus, tell his patient that he is administering something that is likely to destroy the fetus. Destruction of the fetus in such circumstances is obviously a "consequence" of which the pregnant woman may be informed (*Danforth*, 428 U.S. at 67 n. 8). Section 11(d) does not say that the doctor must use the words "abortifacient" or "fetal death"; he is free to get the message across in any way he chooses. Moreover, the doctor is not required to refer to, or to say anything about, the definition of "fetus" formerly contained in Section 2(9). The pregnant woman presumably knows what a "fetus" is; if not, the doctor is free to explain it in his own words. All Section 11(d) requires is that the doctor tell her that she is about to have an abortion if that is what she is about to have.[3]

Section 11(d) is an entirely reasonable provision designed to ensure that women seeking birth control assistance understand the difference between "abortifacients" and "contraceptives." The difference is significant for many women, whether for physical, moral, or religious reasons, and the state plainly has a legitimate interest in ensuring that this difference is explained to them so that they may make an informed choice. In adopting a strained and illogical construction of Section

---

[3] In any event, the court of appeals wholly ignored the fact that the statute's allegedly improper definition of "fetus" was repealed in September 1983. Since then, the statute has defined "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth" (84-1379 J.S. App. 60). It cannot seriously be contended that this definition impermissibly adopts any particular "theory of life" (*Roe* v. *Wade*, 410 U.S. at 162).

11(d), the court of appeals ignored both the State's legitimate interests and proper principles of judicial review.

B. The approach of the courts below betrays in our view an extreme and unseemly hostility to legitimate state regulation of abortion. By subjecting innocuous, even repealed, statutes to strained interpretations, apparently for no other reason than to invalidate them, the courts seemed determined to make regulations so difficult to sustain that abortions before the third trimester will become available virtually "on demand" (*Roe* v. *Wade*, 410 U.S. at 208 (Burger, C.J., concurring)). In so doing, the courts relied heavily on this Court's decision in *Akron*. See, *e.g.*, 84-495 J.S. App. 20a-21a, 24a-25a, 46a-47a, 48a-49a, 79a; 84-1379 J.S. App. 30, 35-36, 38-39. It is perhaps not fanciful to suggest that the courts below may have thought they detected in *Akron* an undercurrent of impatience with state efforts to regulate abortion, and to have taken their cue from that insight.

We believe that *Akron* does represent something of a departure from the Court's previous abortion decisions, both in the standard of review it applies and in the diminished weight it seems to attach to a state's legitimate interests in this area. In reviewing the instant cases, therefore, the Court may find it appropriate to consider whether *Akron* sent an erroneous message to the lower federal courts. There are several respects in which we think that might have happened.

1. This Court in *Roe* v. *Wade* held that the states have legitimate interests in protecting fetal life and preserving maternal health, and that these interests become sufficiently "compelling" at some point during pregnancy to justify restrictions on, or outright proscription of, abortion. Until *Akron*, however, the Court had not suggested that a state's choice among various alternative means of achieving a given "compelling" objective had *itself* to be supported by a compelling state interest. Rather, provided that the state was pursuing a "compelling" objective (*e.g.*, health), a particular regulation was deemed valid if it was "reasonably related" to that objective (*e.g.*, was a rational health regulation) and did

not "unduly burden" the woman's freedom of choice respecting abortion. See, *e.g.*, *Danforth*, 428 U.S. at 80; *Beal* v. *Doe*, 432 U.S. at 445; *Maher* v. *Roe*, 432 U.S. at 473.

The *Akron* decision seems to signal a departure from this analytical framework. Certain passages in that opinion suggest, for example, that a state, in crafting a regulation designed to protect maternal health, must demonstrate a "compelling interest" in selecting one of several options, each of which represents a rational means of achieving the state's goal. This is most evident in the Court's treatment of Akron's "informed consent" provisions. The ordinance required "the attending physician" to inform his patient of the relative risks and consequences of pregnancy and abortion (462 U.S. at 446). The Court acknowledged that this information was "clearly related to maternal health and to the State's legitimate purpose in requiring informed consent" (*ibid.*). The Court acknowledged the importance of having this information conveyed by a "well-trained and competent counselor[]" (*id.* at 449 n. 41). The Court acknowledged that its earlier decisions had "stressed repeatedly the central role of the physician * * * in consulting with the woman about whether or not to have an abortion" (*id.* at 447 (original quotation marks omitted)). And the Court found nothing in the record to "suggest that ethical physicians will charge more for adhering to this typical element of the physician-patient relationship" (*ibid.*). Yet the Court nevertheless held the ordinance unconstitutional because it required the attending physician to make the communication, rather than permitting his assistant to do so. The Court was "not convinced * * * that there is as vital a state need for insisting" that the information be conveyed by the one rather than by the other (462 U.S. at 448).

This holding, in our view, cannot be squared with the Court's previous opinions. A requirement that *the physician* convey the medical information was surely "reasonably related" to Akron's compelling health objective, and that requirement was not shown to have in-

creased the cost of abortions by a magnitude sufficient to impose an "undue burden" on pregnant women's freedom of choice. The regulation should accordingly have been sustained.

2. Prior to *Akron*, this Court had consistently recognized that a State may legitimately "make a value judgment favoring childbirth over abortion" (*Maher* v. *Roe*, 432 U.S. at 474). "The Constitution," the Court had said, "does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions," and hence the fact that a regulation "may inhibit some [women] from seeking abortions is not a valid basis to void the statute" (*H.L.* v. *Matheson*, 450 U.S. 398, 413 (1981)). To the contrary, the Court had held that "state action 'encouraging childbirth except in the most urgent circumstances' is 'rationally related to the legitimate governmental objective of protecting potential life'" (*ibid.*, quoting *Harris* v. *McRae*, 448 U.S. 297, 325 (1980)).

Certain passages in *Akron* again seem to signal a departure from these principles. The Court in *Akron* suggested, for example, that a state regulation is invalid if it is "designed to influence the woman's informed choice between abortion or childbirth" (462 U.S. at 444 (footnote omitted)). On that premise, the Court struck down provisions requiring that certain information be furnished to a woman contemplating an abortion, reasoning that the information was "designed * * * to persuade her to withhold" her consent to that procedure (*ibid.*).

Once a woman steps into an abortion clinic, however, there is no way a state can promote its legitimate policy of "encouraging childbirth" without at the same time "discouraging abortion". A woman who enters "an abortion clinic, where abortions for pregnant minors frequently take place," is presumably inclined to terminate her pregnancy, and it is "unlikely that she will obtain adequate counsel from the attending physician at an abortion clinic," much less be dissuaded from her proposed course. *Bellotti II*, 443 U.S. at 641 (original quotation marks omitted). Indeed, as a doctor at one of the clinics involved in *Akron* testified, when a teenager

showed up at the clinic he assumed the decision was made: "When you go to a bar, you go there to drink" (81-746 Resp. Br. 20). Obviously, no state can promote a policy of "encouraging normal childbirth" in such circumstances unless it is allowed to place a counterweight in the other side of the scales.

The *Akron* majority thus had little basis in precedent for suggesting that state action is unconstitutional per se if it is "designed to influence the woman's informed choice between abortion or childbirth." If the state's interest in encouraging childbirth is to mean anything, and if the woman's consent to abortion is to be truly informed, the state must be allowed, in a reasoned and objective way, to tell its side of the story, and a story favoring childbirth is a permissible story for it to tell. Of course, should the state convey that message in an inaccurate or overbearing fashion, or otherwise attempt to compel or coerce the woman's decision, her decision would not be "knowing, intelligent, and voluntary" (*Danforth*, 428 U.S. at 90 (Stewart, J., concurring)), and the state's action would constitute "an unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (*Maher* v. *Roe*, 432 U.S. at 474). But an effort by the state to influence a pregnant woman to choose childbirth instead of abortion, in a manner that does not impair her freedom of choice, can hardly be thought to erect an unconstitutional obstacle.

3. Prior to *Akron*, this Court's abortion opinions generally reflected the well-settled rule that federal courts should accord state statutes a sympathetic construction that favors their constitutionality. See, *e.g.*, *Danforth*, 428 U.S. at 64; *Bellotti II*, 443 U.S. at 645 & n.25; *H.L.* v. *Matheson*, 450 U.S. at 406, 407 & n.14, 412. Once again, however, the *Akron* opinion seems to suggest a more hostile approach. This is perhaps most evident in the majority's treatment of Akron's regulation requiring that physicians performing abortions "insure that the remains of the unborn child are disposed of in a humane and sanitary manner" (462 U.S. at 451). The city averred that this regulation was designed simply "to

preclude the mindless dumping of aborted fetuses onto garbage piles" (*ibid.* (original quotation marks omitted)). The Court nevertheless held the regulation unconstitutionally vague, speculating that "[t]he phrase 'humane and sanitary' does, as the Court of Appeals noted, suggest a possible intent to mandate some sort of decent burial of [the] embryo" (*ibid.* (original quotation marks omitted)).

This approach is difficult to reconcile with the Court's previous opinions. Akron's ordinance was surely susceptible of a constitutional construction. The phrase "humane and sanitary" appears in countless laws regulating health and safety. Congress has even mandated the "humane * * * disposal of excess wild free-roaming horses and burros" (43 U.S.C. 1901(a)(6)). As a familiar regulatory formula, the phrase "humane and sanitary" resembles the phrase "informed consent," which the Court in *Danforth* held not to be vague (see 428 U.S. at 67 n.8). In striking down the Akron formula based on speculation that the draftsmen of the ordinance might have intended to mandate "some sort of decent burial" (462 U.S. at 451), the Court in *Akron* may have invited the kind of unsympathetic statutory construction, the temptation to impugn legislative motives, that the courts of appeals engaged in here.

C. Having said this, candor compels us to state our conviction that *Akron* is a symptom, not the source, of the problem. As the decisions below demonstrate, the constitutional inquiry mandated by *Roe* v. *Wade* is not easy for courts to conduct in a principled fashion. The key factors in the equation—viability, trimesters, the right to terminate one's pregnancy—have no moorings in the text of our Constitution or in familiar constitutional doctrine. Because the parameters of the inquiry are indeterminate, courts are disposed to indulge in a free-ranging, essentially legislative, process of devising regulatory schemes that reflect their notions of morality and social justice. The result has been a set of judicially-crafted rules that has become increasingly more intricate

and complex, taking courts further away from what they do best and into the realm of what legislatures do best.

We recognize that the principle of *stare decisis*, furthering as it does the policies of continuity and consistency of adjudication, weighs against reconsidering recent precedents. See *Atascadero State Hospital* v. *Scanlon*, No. 84-351 (June 28, 1985), slip op. 9-10 n.3; *Akron*, 462 U.S. at 420 & n.1. This principle, however, does not count so strongly in constitutional litigation, where, short of a constitutional amendment, this Court is the only body capable of effecting a needed change. See *Akron*, 462 U.S. at 420; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962). Moreover, this Court must respond to obligations that transcend the institutional concerns underlying the doctrine of *stare decisis*. *See Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 77-78 (1938) ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.") (Brandeis, J.)). Where a judicial formulation affecting the allocation of constitutional powers has proven "unsound in principle and unworkable in practice," where it "leads to inconsistent results at the same time that it disserves principles of democratic self-governance," this Court has not hesitated to reconsider a prior decision. *Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985), slip op. 18.

1. To provide a regime for delimiting the permissible scope of abortion regulation, *Roe* v. *Wade* divided pregnancy into three trimesters, with radically different consequences for state regulatory power in each. This analytical framework has proved inherently unworkable. Subsequent developments, both technological and medical, have demonstrated the arbitrariness of these lines: the Court "simply concluded that a line must be drawn, * * * and proceeded to draw that line" (*Garcia*, slip op. 14 (original quotation marks omitted)). Arbitrary line-

drawing may occasionally be necessary to make explicit constitutional rights efficacious, but such arbitrariness gains the appearance of legislation pure and simple where the subject is one upon which the Constitution is silent.

The Court in *Roe* v. *Wade* properly recognized that the states have a strong interest in safeguarding maternal health, but it is difficult to grasp why the compelling quality of this interest should undergo a radical change at the end of the first trimester. The Court made a determination—basically one of legislative fact—that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth" (410 U.S. at 149, 163). The legislative nature of this finding is shown by "evidence that developments in the past decade, particularly the development of a much safer method for performing second-trimester abortions, * * * have extended the period in which abortions are safer than childbirth" (*Akron*, 462 U.S. at 429 n.11). The fact that *Akron*, despite this evidence, retained the end of the first trimester as the sharply determinative point demonstrates that point's essential arbitrariness. As Justice O'Connor wrote in dissent, "The fallacy inherent in the *Roe* framework is apparent: just because the State has a compelling interest in ensuring maternal safety once an abortion may be more dangerous than childbirth, it simply does not follow that the State has *no* interest before that point that justifies state regulation to ensure that first-trimester abortions are performed as safely as possible" (*id.* at 460 (emphasis in original)).

It was similarly arbitrary for the Court in *Roe* v. *Wade* to determine that the state's legitimate interest "in protecting prenatal life" (410 U.S. at 150, 153-154) undergoes a constitutionally significant change at the point of fetal viability. There is no obvious constitutional connection between the ability of a fetus to survive outside the womb, and the magnitude of a state's lawful concern to protect future life. As Justice O'Connor said in her *Akron* dissent, "[*P*]*otential* life is no less poten-

tial in the first weeks of pregnancy than it is at viability or afterward. * * * The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward" (462 U.S. at 461 (emphasis in original)).

The "viability" standard is particularly unworkable as a constitutional reference point because it changes with advances in technology. The "increasingly earlier fetal viability" demonstrated in recent scientific studies (462 U.S. at 457 (O'Connor, J., dissenting)) obviously owes to improvements in medical techniques, and not to any change in our perceptions about how fully developed or worthy of life a fetus is at any point in time. It is disturbing to attribute constitutional significance to a point which, besides being in motion rather than being fixed, has its movements dictated by advances in engineering rather than by forces more familiar to traditional judicial analysis.

The arbitrary nature of *Roe* v. *Wade*'s analytical framework is reflected in the increasingly complex line-drawing of its progeny. A state may require that certain information be furnished to a woman by a doctor or his assistant (*Akron*, 462 U.S. at 448), but may not require that such information be furnished to her by the doctor himself (*id.* at 449). A state may require that second-trimester abortions be performed in clinics (*Simopoulos* v. *Virginia*, 462 U.S. 506 (1983)), but may not require that they be performed in hospitals (*Akron*, 462 U.S. at 437-439). As each set of these subtle distinctions was crafted, still more unanswered questions were posed. During the decade since *Roe* v. *Wade* the adversaries in the abortion debate have come back again and again, asking this Court to spin an ever-finer web of regulations. The adversaries are back again today. They are sure to return. Each time, the set of rules will get longer and more intricate. This is an inappropriate burden to impose on any court, or on any Constitution.

2. The second, compelling ground for our urging reconsideration of *Roe* v. *Wade* is our belief that the tex-

tual, historical and doctrinal basis of that decision is so far flawed [4] that this Court should overrule it and return the law to the condition in which it was before that case was decided.

There is no explicit textual warrant in the Constitution for a right to an abortion. It is true, of course, that words, and certainly the words of general constitutional provisions, do not interpret themselves. That being said, the further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning. Constitutional interpretation retains the fullest measure of legitimacy when it is disciplined by fidelity to the framers' intention as revealed by history, or, failing sufficient help from history, by the interpretive tradition of the legal community. That tradition is illuminated not only by court decisions, but by the practice of lawyers and legislatures "in the compelling traditions of the legal profession." *Rochin* v. *California*, 342 U.S. 165, 171 (1952) (Frankfurter, J.).

We respectfully submit that by these criteria *Roe* v. *Wade* is extraordinarily vulnerable. It stands as a source of trouble in the law not only on its own terms, but also because it invites confusion about the sources of judicial authority and the direction of this Court's own future course. *Stare decisis* is a principle of stability. A decision as flawed as we believe *Roe* v. *Wade* to be becomes a focus of instability, and thus is less aptly sheltered by that doctrine from criticism and abandonment.

---

[4] This judgment is shared by a broad spectrum of constitutional scholars. See, *e.g.*, J. H. Ely, *Democracy and Distrust* 2-3, 248 n.52 (1980); Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 Wash. U.L.Q. 817, 819; Burt, *The Constitution of the Family*, 1979 Sup. Ct. Rev. 329, 371-373; A. Bickel, *The Morality of Consent* 27-29 (1975); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 Sup. Ct. Rev. 159; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-311 (1973); Ely, *The Wages of Crying Wolf: A Comment on Roe* v. *Wade*, 82 Yale L.J. 920 (1973).

a. The ultimate textual source for *Roe* v. *Wade* (410 U.S. at 129) is the Fourteenth Amendment's guarantee: "nor shall any State deprive any person of * * * liberty * * * without due process of law." It is late in the day to argue that this provision should be limited to its apparent textual meaning: government's actually taking hold of a person, as to confine him, without fair procedures. The expansive possibilities of "due process," however, early offered temptations which by all accounts led to one of the most troubled and demoralizing episodes in our constitutional history, during which the Court repeatedly frustrated the workings of the ordinary democratic process by imposing its own debatable and parochial view of appropriate social policy. *E.g.*, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923); *Lochner* v. *New York*, 198 U.S. 45 (1905). The now prevailing doctrine that the Due Process Clause incorporates particular protections of the Bill of Rights, however controversial on historical grounds,[5] was plainly intended to have the function of reining in such judicial extravagance and reanchoring the interpretation of that Clause in the constitutional text—though somewhat downstream of its historical starting point. See *Adamson* v. *California*, 332 U.S. 46, 69-72 (1947) (Black, J., dissenting).

Viewed in this context, *Roe* v. *Wade* seems particularly ill-founded. Due process analysis, while it must recognize the need to go beyond scrutiny of the few relevant words of the Clause, must nevertheless seek a connection with the intentions of those who framed and ratified the constitutional text. As this Court acknowledged in *Roe* v. *Wade* (410 U.S. at 138-139), however, and as Justice Rehnquist emphasized in dissent (*id.* at 174-176 & n.1), state laws condemning or limiting abortion were very general at the time the Fourteenth Amendment was adopted. Indeed, the period between 1860 and 1880 witnessed "the most important burst of anti-abortion legislation in the nation's history" (J. Mohr, *Abortion in*

---

[5] See, *e.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

America 200 (1978)). Nor does the tenor and contemporaneous understanding of those laws leave much doubt that they were directed, not only at protecting maternal health, but also at what was widely viewed as a moral evil comprehending the destruction of actual or potential human life (see Mohr at 35-36) and the undermining of family values in whose definition and reenforcement the state has always had a significant stake. It is fair to conclude that those who drafted and voted for the Fourteenth Amendment would have been surprised indeed to learn that they had put any part of such subjects beyond the pale of state legislative regulation.

Surely this historical context of the Due Process Clause is relevant to its interpretation. The most usual and straightforward use of history is to illuminate the intention of controversial constitutional texts. The debate about the practices contemporaneous with the adoption of the Establishment Clause was waged precisely because it has been thought to bear on that Clause's meaning: either to show acceptance of considerable state involvement in religion (see *Lynch* v. *Donnelly*, No. 82-1256 (Mar. 5, 1984), slip op. 4-8; *Marsh* v. *Chambers*, 463 U.S. 783, 787-791 (1983)), or to demonstrate that such involvement had fostered a controversy the Clause was meant to resolve. History similarly has been invoked as dispositive in regard to the acceptability of the death penalty under the Eighth Amendment: How could framers who before, during and after that Amendment's adoption regularly acquiesced in the application of capital punishment be taken to have condemned this practice as cruel and unusual? See *Gregg* v. *Georgia*, 428 U.S. 153, 176-177 (1976) (plurality opinion); *Furman* v. *Georgia*, 408 U.S. 238, 380 (1972) (Burger, C.J., dissenting); *id.* at 408 n.6 (Blackmun, J., dissenting). History has regularly been invoked to elucidate the meaning of the Fifth Amendment's guarantee against self-incrimination (see *Kastiger* v. *United States*, 406 U.S. 441, 443-447 (1972); *Miranda* v. *Arizona*, 384 U.S. 436, 458-460 (1966)), and the Sixth Amendment's guarantee of trial by jury. See *Williams* v. *Florida*, 399 U.S. 78, 86-103

(1970); *Duncan* v. *Louisiana*, 391 U.S. 145, 151-154 (1968). In all these instances the use of history was straightforward. The purpose for which history is invoked in *Roe* v. *Wade*, by contrast, is far from evident. The Court's opinion appears to acknowledge the relevance of history, yet it reaches a conclusion in direct variance with the historical facts recited.

b. History is invoked in another way to take account of developments in society and the law. Such an approach has seemed particularly plausible in determining the application of the Fourth Amendment's protections to such undreamt-of developments as wire-tapping, electronic surveillance, the searches of automobiles and airplanes. History in this sense appears as a vector, in which the original understanding is seen as the point of departure for developing values implied and inchoate at the point of origin. But whether the vector is held to lead to a right to attend criminal trials (*Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 557-580 (1980)) or a right to travel (*Shapiro* v. *Thompson*, 394 U.S. 618, 630 (1969)), the Court has always taken pains to trace its point of origin back to specific constitutional provisions by a route either inferential or historical.

In *Roe* v. *Wade*, by contrast, the connections by either route were wholly missing and the Court was forced to leap to its conclusion. Certainly the course of legal attitudes and practice, "the compelling traditions of the legal profession" (*Rochin* v. *California*, 342 U.S. at 171), permit no extrapolation from the past to the Court's conclusion in *Roe* v. *Wade*. The story traced by the Court does not show a steady and growing acceptance of a point of view until the practice in a few jurisdictions can be characterized as anomalous. At most, the historical account in *Roe* v. *Wade* shows an ebb and flow of condemnation and concern about the practice of abortion. More accurately, it would seem that the passage of the Fourteenth Amendment roughly coincided with the rise of particular *stringency* in abortion laws, and that, between 1868 and 1973, such stringent laws appeared as a

general feature of the legal landscape, representing by the Court's own count the policy "in a majority of the States." 410 U.S. at 118. This historical trajectory does not support the conclusion for which it was adduced.

c. There remains the inferential route, by which a specific constitutional text is seen to harbor the germ of a theory that establishes a general and fundamental right. The classic statement of this line of reasoning is found in Justice Harlan's dissent in *Poe* v. *Ulman*, 367 U.S. at 541-543. He wrote that "the liberty guaranteed by the Due Process Clause * * * is not a series of isolated points pricked out in terms of" the particular rights enumerated in the first eight Amendments. Rather, he said, liberty "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints" (*ibid.*).

As Justice Harlan was at pains to insist, however, even this process of inferential extrapolation is directly rooted in textually specified constitutional values. The same connection "to what went before" is insisted upon in *Griswold* v. *Connecticut*, 381 U.S. 479, 484-485 (1965). The invocation in *Roe* v. *Wade* of both the particular concept of privacy and of this general mode of constitutional analysis, far from being anchored in text, history, or precedent, is an abrupt departure from the Court's prior decisions.[6] Indeed, all of the "privacy" cases that the Court cited in *Roe* v. *Wade* were applications of accepted

---

[6] As Dean Ely explained, this Court's invalidation in *Griswold* of a statute regulating the *use* of contraceptives, as opposed to their manufacture or sale, indicated an underlying concern that enforcement of the statute "*would have been virtually impossible* without the most outrageous sort of governmental prying into the privacy of the home." 82 Yale L.J. at 929-930 (emphasis in original). A statute limiting a medical procedure performed by a doctor in a clinic or hospital is simply not analogous; abortion statutes could obviously be enforced without the necessity of repulsive searches. Fourth Amendment policies accordingly provide no support for the holding in *Roe* v. *Wade*.

principles, whether of equal protection [7] or of freedom of expression at the core of the First Amendment.[8] Neither equal protection, nor intrusion upon the home, nor freedom to think or promulgate ideas is involved in laws regulating abortion.

d. There can be no doubt of the strength of the conviction held by some that free access to abortion is a fundamental expression of individual freedom, and that such freedom is the first principle of a just society. A conviction of self-evidence may well accompany a view so strongly held. Yet this conviction does not constitute constitutional argument. It is at best an intuition based in controversial moral and social theories of the good life and of an individual's situation in society, theories "which a large part of the country does not entertain." *Lochner* v. *New York*, 198 U.S. at 75 (Holmes, J., dissenting). And when controversial but seemingly self-evident convictions are translated directly into constitutional doctrine, we risk repeating the whole lamentable story surrounding *Lochner* for which Justice Holmes (*id.* at 76) composed the epitaph at its birth: "[The Constitution] is made for people of fundamentally differ-

---

[7] *Skinner* v. *Oklahoma*, 316 U.S. 535, 538 (1942) (criminal sterilization act violated equal protection by distinguishing without an adequate basis between persons convicted of larceny and embezzlement); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (statute prohibiting interracial marriages involved "invidious racial discriminations"); *Eisenstadt* v. *Baird*, 405 U.S. 438, 446-455 (1972) (statute prohibiting distribution of contraceptives violated equal protection by treating married and unmarried women differently without a rational basis).

[8] *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923) (invalidating law prohibiting the teaching of foreign languages in private elementary schools because "[m]ere knowledge of the German language cannot reasonably be regarded as harmful"); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (invalidating statute requiring all children to attend public schools); *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944) (prosecution of Jehovah's Witness under statute prohibiting sale by minors of periodicals implicates but does not violate freedom of religion); *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (reversing criminal conviction for mere possession of films in defendant's home).

ing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

As in logic contradictory premises can be used to prove anything, so in constitutional law principles that are ill-founded can be used to justify any conclusion, and thus rob the law of its intrinsically compelling force. And when constitutional law, which is above ordinary politics, seeks to settle disputes of value and vision which are the stuff of politics, both law and politics are more not less subject to the kind of intense pressures which have characterized the abortion debate since *Roe* v. *Wade*.

CONCLUSION

The portions of the court of appeals' judgments that invalidate appellants' abortion regulations should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

CAROLYN B. KUHL
Deputy Assistant Attorney General

JOHN F. CORDES
JOHN M. ROGERS
Attorneys

JULY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10257